SUPREME COURT, U.S.
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No. 05

# In the Supreme Court of the United States

INTERA CORPORATION AND
INTERA TECHNOLOGIES INC.,
*Petitioners*,

v.

GEORGE HENDERSON, III; JOHN ENGLAR;
NANO-TEX, INC., a/k/a NANO-TEX, LLC,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Where defendants who are situated entirely outside the State of Tennessee engage in intentional conduct, under circumstances where they reasonably know the out-of-state activity will cause damage to a Tennessee business, may the non-Tennessee defendants be sued in Tennessee courts pursuant to the provisions of the Tennessee "long-arm statute," *Tennessee Code Annotated* § 20-2-214(c).

## PARTIES TO PROCEEDING

Petitioner Intera Corporation is a close corporation organized under the laws of the State of Tennessee, in which the Ted A. Mallen Family Trust is the major (92%) shareholder. Intera Technologies, Inc. is a subsidiary corporation of Intera Corporation. Other minimal shareholders are as follows: Estate of Muriel G. Mallen; James E. Klopman; Ival J. Goldstein; Brad J. Goldberg; and Lori J. Yarom. George Henderson, III and John Englar are individuals who reside in the State of North Carolina. Nano-Tex, LLC and Nano-Tex, Inc. are businesses organized in the State of North Carolina, and owned by George Henderson, III and John Englar.

## RULE 29.6 STATEMENT

Intera Corporation and Intera Technologies, Inc. are Tennessee corporations organized and existing under the laws of the State of Tennessee, with principal offices located at 4301 Founders Way, Building C, Chattanooga, Tennessee 37422.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners Intera Corporation and Intera Technologies, Inc. (hereinafter "Intera") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Sixth Circuit Court of Appeals is published at 428 F.3d 605 (6th Cir.).

## JURISDICTION

The United States Sixth Circuit Court of Appeals issued its opinion on November 10, 2005, in which it affirmed in part, and reversed in part, the decision of the trial court from the United States District Court for the Middle District of Tennessee at Nashville. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

The circumstances under which a state court may exercise "long-arm" personal jurisdiction over individuals or businesses who are situated entirely outside the state remains unsettled. Despite some clarification in case law, the uncertainty in the application of *in personam* jurisdiction to individuals who have never visited a state, and who have engaged in activities entirely outside of the forum state has produced inconsistent trial level and appellate decisions, particularly in instances in which the Defendants have no contacts with the state, but purposefully and foreseeably intended to cause effects within the foreign state.

In the present matter, the dispute arises from the conduct of two North Carolina residents, George Henderson, III and John Englar. Henderson and Englar are executives with the Burlington Industries Corporation. At all times pertinent to the complaint allegations, Henderson and Englar were situated in the State of North Carolina. As Burlington executives, Henderson and Englar, as part of their duties for Burlington, came into contact with Intera, a Tennessee corporation. Burlington, in contracts negotiated with Intera, had contracted with Intera for certain specialized textile treatment information and services. The contracts, in which Henderson and Englar participated, recognized the secrecy and confidentiality of Intera's trade practices and technical "know how." The contract between Burlington and Intera contemplated a Tennessee court forum in the event of any breaches or disputes.

Henderson and Englar secretly (on their own, independent of any connection to Burlington) created their own North Carolina company, operating under the name of "Nano-Tex." Nano-Tex had no direct contacts with the State of Tennessee or Intera. However, Nano-Tex is alleged to have adopted the confidential technological processes which Intera had entrusted to Henderson and Englar through their positions as Burlington executives. It is claimed by Intera that, through the Defendants' access to the contract information between Intera and Burlington, Henderson and Englar conspired to fraudulently take the information and utilize it for their own personal profit under the Nano-Tex identity. Once the technological processes had been gained by the Defendants, the Defendants then contacted other customers of Intera (in states other than Tennessee) and persuaded those companies to breach their technology agreements with Intera by transferring that business to their new company, "Nano-Tex."

It is conceded that Henderson and Englar physically conducted none of the foregoing activities within the State of Tennessee, and, further, that Henderson and Englar were not individual signatories on the contract between Intera and Burlington. Henderson and Englar were involved in the Burlington contract only as employees of Burlington who assisted in the effecting of the contractual provisions for their employer, thereby gaining access to the secret technological information regarding textile substrates. No telephone calls were placed to Tennessee in furtherance of the conspiratorial conduct, and no direct contact with the state has been alleged by the Plaintiffs. On the contrary, Plaintiffs have asserted proper application of the Tennessee "long-arm statute" upon the claim that the Defendants, while engaging in their North Carolina conspiratorial activities, knew with reasonable certainty that those activities would have a damaging effect upon the Tennessee Plaintiffs.

## REASONS WHY THE WRIT SHOULD BE GRANTED

Since the announcement in 1945 of the Court's decision in *International Shoe Company v. Washington*, 326 U.S. 310 (1945) the conduct of interstate commerce has produced a variety of both specific and general circumstances in which it has been recognized that the due process clause of the United States Constitution will permit a defendant to be haled into a state court's jurisdiction where that defendant has been shown to have purposefully availed itself of the privilege of doing business within the state, and when it is reasonable to exercise that jurisdiction under the facts and circumstances of a particular case.

The granting of the petition is supported by significant policy considerations which extend beyond the narrow factual context of the present case.

In an era in which competitive technological changes out pace the cautious progress of the law, internet-based commerce presents, in another context, a realistic example of new opportunities for "purposeful availment," without direct or regular contacts with the state. For example, in 2001 the United States District Court for the Northern District of California (*Yahoo, Inc. v. LaLigue*, 145 F. Supp. 2d 1168 (U.S.D.C. CA. 2001)) considered a request by a French corporation to dismiss (based on lack of personal jurisdiction) Yahoo's ". . . novel legal issues arising from the global nature of the Internet." Construing this Court's decision in *Reno v. ACLU*, 521 U.S. 844, 138 L. Ed. 2d 874, 117 S.Ct. 2329 (1997), the trial court denied the French corporations motion to dismiss, finding that Yahoo had made a sufficient *prima facie* showing of purposeful availment under the "effects" tests. With no showing of a physical presence by the defendant in the State of California, and no direct, traditional contacts, the demonstration of conduct which intentionally affected property interests within the State of California was deemed sufficient in disallowing the defendant's motion to dismiss. In *Yahoo*, the defendant was alleged to have "knowingly engaged in actions intentionally targeted at the plaintiff's headquarters for the express purpose of causing the consequences of such actions to be felt in the foreign state." While those actions were taken in the context of Internet activity, the legal concept is exactly the same as in the present case. The scope of that application remains unsettled.

In the present matter, the Sixth Circuit Court of Appeals has affirmed the trial court's determination that (in the context of *Southern Machine Company v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968)) the Plaintiffs have not alleged conduct which is sufficient to demonstrate that the North Carolina plans and activities of Henderson and Englar would constitute "purposeful availment" to make reasonable the

exercise of Tennessee court jurisdiction based upon that North Carolina conduct. The appellate court decision to affirm the trial court's dismissal of the claim is based upon the Plaintiffs' concession that no agent acted within this state on behalf of Henderson or Englar.

The question is whether Henderson and Englar's exploitation of the Intera "Tennessee" contract with Burlington, in the context of their roles as Burlington agents, provides a sufficient nexus to permit litigation of the alleged fraudulent conduct in Tennessee courts.

*Tennessee Code Annotated* § 20-2-214 permits the exercise of long-arm jurisdiction upon ". . . any basis not inconsistent with the constitution of this state or of the United States." It further permits exercise of jurisdiction against any person who ". . . shall be deemed to have submitted to the jurisdiction of this state and who acts in the manner above-described through an agent or personal representative."

The Tennessee Supreme Court has expanded that concept to apply to several out-of-state defendants (who engaged in out-of-state activities) but where one of the conspirators had direct contacts within the State of Tennessee. *Chenault v. Walker*, 36 S.W.2d 45 (Tenn. 2001).

Whether the presence of the subject matter of the offended property right within the State of Tennessee is sufficient (based upon the "effects" test) to satisfy the requirements of due process remains unanswered. Otherwise stated, the confidential property rights which were created under the terms of the Tennessee contract comprised a *res*, as an asset or thing of value which came into existence within the State of Tennessee through the existence of the Tennessee contract. The Defendants fraudulently took that "thing of value"

knowing how it was created, and understanding the resulting damage to a Tennessee business.

The Plaintiffs' complaint directly alleges fraudulent, conspiratorial conduct by the Defendants in the State of North Carolina. *Chenault* provides no direct guidance in the resolution of the present issue, although it is of some assistance in understanding how the Tennessee Supreme Court has analyzed unlawful conduct outside of the state which would have reasonably foreseeable consequences within the state:

> "This theory holds that an out-of-state defendant involved in a conspiracy, who lacks sufficient "minimum" contacts with the forum state may nevertheless be subject to jurisdiction because of a co-conspirator's contacts with the forum." 36 S.W.3d 45 at p. 51.

Although no "co-conspirator" has acted within the State of Tennessee in the present matter, the prerequisites of reasonableness and foreseeability are established by the allegation of fraudulent, conspiratorial conduct directed toward the misappropriation of contract rights created through the vehicle of a Tennessee contract.

Concisely stated, it is the Petitioners' respectful position that an analysis of the conduct of a defendant in a long-arm/personal jurisdiction issue has evolved gradually from the concept that purposeful, physical presence within the state is necessary, to recognize that purposeful, targeted, conspiratorial efforts by an out-of-state defendant, shown to be intended to impact upon a Tennessee company, should be actionable in Tennessee courts. The concept is consistent with the traditional